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No. 82-1137

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN RADIO ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In this case the court of appeals, in a per curiam opinion (Pet. App. A-1 to A-5), upheld a Federal Communications Commission ("FCC") rulemaking decision (Pet. App. B-1 to B-23) exempting certain cargo vessels from the requirement that they be equipped with a radiotelegraph (Morse code) station. Petitioners' challenge to that decision is without merit and does not warrant review by this Court.

1. Unless exempted, all United States cargo vessels of 1600 tons or more are required to have a radiotelegraph station. See Section 351(a)(1)(A) of the Communications Act of 1934, (the Act), 47 U.S.C. 351(a)(1)(A). This requirement is specifically subject to the limitations set forth in Section 352. One such limitation, in 47 U.S.C.

352(b)(2), expressly authorizes the FCC to grant exemptions for "any ship or class of ships" not traveling more than 150 miles from land if the Commission "considers that the route or the conditions of the voyage or other circumstances are such as to render a radio station unreasonable or unnecessary for the purposes of this part."

Under this statutory authority, the FCC in 1982 adopted a rule exempting from the radiotelegraph requirement cargo vessels of 1600 tons or more that (1) travel only on domestic coastwise voyages, (2) travel no more than 150 miles from the coast of the contiguous 48 states, and (3) carry an array of communications equipment, including a satellite communications terminal, that the FCC concluded "would provide equivalent or better communications for distress and safety" than radiotelegraph equipment (Pet. App. B-2 to B-3). The Commission, noting that "significant advances * * * have occurred in radiotelephony" (*id.* at B-18), found that the presence of the sophisticated array of substitute equipment[1] would render a radiotelegraph installation "unreasonable and unnecessary" for the purposes of the Communications Act. *Ibid.*

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[1]The exemption is available only to ships with the following equipment: a satellite communications terminal with both voice and telex (teletype) capability, a single sideband radiotelephone with voice channels capable of operating on any distress and safety channel in the marine bands, a narrow-band direct-printing radiotelegraph (teletype) with SITOR (error detection), a 2182 kiloHertz radiotelephone distress frequency watch receiver with a radiotelephone alarm signal generator, at least two VHF transceivers, and a 500 kiloHertz radiotelegraph automatic alarm receiver. The ships must also have provisions for emergency and reserve power and for operating and maintaining all of the distress and safety-related systems. In addition, the ships must participate in the Coast Guard's automated mutual-assistance vessel rescue system (AMVER). 47 Fed. Reg. 10226 (1982), to be codified in 47 C.F.R. 83.480(c); Pet. App. A-3 n.1, B-23, D-42 to D-43.

2. The exemption granted by the Commission extends only to the "radiotelegraph requirements of Title III, Part II of the Communications Act of 1934, as amended," 47 C.F.R. 83.480(c) (Pet. App. B-23). The Commission's Report and Order clearly stated (*id.* at B-2) it intended the rule to exempt ships only from the "requirements of Section 351(a)(1)(A) of the Communications Act, which requires cargo ships of 1600 gross tons and upward to be equipped with a radiotelegraph station." Thus, there is no warrant for the petitioners' concern that the Commission has exempted ships from direction finding or survival craft radio requirements (Pet. 12-15) imposed by statute[2] or by rule.[3] The Commission's intent to limit the exemption to the radiotelegraph station requirement is clearly expressed and is entitled to deference. *Fidelity Federal Savings & Loan Association* v. *De La Cuesta*, No. 81-750 (June 28, 1982) slip op. 15-16 n.13 (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)).

3. This case presents no important federal question requiring resolution by this Court. The agency concluded (Pet. App. B-19), after consideration of the evidence tendered in the rulemaking proceeding, that the prescribed substitute equipment was at least equivalent to manual Morse code radiotelegraphy, and would be an adequate substitute for it. Although petitioners dispute the Commission's conclusions about the relative merit of the substitute array, this is clearly a judgment within the Commission's

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[2]47 U.S.C. 351(a)(2) requires ships of 1600 tons and upwards to have an "efficient radio direction finding apparatus approved by the Commission," and 47 U.S.C. 354(i) specifies that the radio direction finder must be equipped to receive signals on all radiotelegraph frequencies. 47 U.S.C. 355 requires ships subject to certain international treaties to have survival craft radios found by the Commission to be appropriate.

[3]See 47 C.F.R. 83.458 to 83.462, 83.469 to 83.473.

expertise and is entitled to substantial deference. *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 & n.30 (1981); *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978).

Moreover, the court below applied the proper standard of review in affirming the Commission's decision. *FCC* v. *WNCN Listeners Guild, supra*, 450 U.S. at 594. Accordingly, this case warrants no further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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